FOR ARGUMENT

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OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

Page

CITATIONS

Cases:

Bay Counties District Council of Carpenters (Disney Roofing and Material Company), 154 NLRB 1598 5

Building and Construction Trades Council of Santa Barbara County (Sullivan Electric Company), 154 NLRB 1086 5

Carey v. *Westinghouse Electric Corp.*, 375 U.S. 261 3

Dee Cee Floor Covering, Inc., 232 NLRB No. 72, decided September 27, 1977 8

International Ladies' Garment Workers' Union v. *National Labor Relations Board*, 366 U.S. 731 3

Local 86, Painters (Carpet Control, Inc.), 216 NLRB 1127 ..... 4, 5

Oilfield Maintenance Co., Inc., 142 NLRB 1384 ..... 6, 7

R.J. Smith Construction Co., 191 NLRB 693, enforcement denied *sub nom. Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d 1186 6-7

Retail Clerks International Association v. *Lion Dry Goods, Inc.*, 369 U.S. 17 ..... 1, 2, 3, 4

Retail Clerks International Association v. *Montgomery Ward & Co.*, 316 F. 2d 754 3

Page

Cases—continued:

Ruttmann Construction Co., 191 NLRB 701 7

Smith Steel Workers v. *A.O. Smith Corp.*, 420 F. 2d 1 3

South Prairie Construction Co. v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800, decision following remand *sub nom. Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB No. 13, 95 LRRM 1510 8

Statutes:

Labor Management Relations Act, Section 301(a), 61 Stat. 156, 29 U.S.C. 185(a) 1, 2, 3

National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*:

Section 8(a)(5), 29 U.S.C. 158(a)(5) 7

Section 8(b)(7), 29 U.S.C. 158(b)(7) .4, 5, 7, 8

Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C) 9

Section 8(f), 29 U.S.C. 158(f) 2, 4, 5, 6, 7

Section 9(a), 29 U.S.C. 159(a) 6

Miscellaneous:

Penfield, *The Double-Breasted Operation in the Construction Industry*, 27 CCH Labor Law J. 89 (1976) 8

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1. *Amicus curiae* American Federation of Labor and Congress of Industrial Organizations errs in contending (Am. Br. 10-13) that the Board's decision in this case is contrary to *Retail Clerks International Association* v. *Lion Dry Goods, Inc.*, 369 U.S. 17.

In *Lion Dry Goods* this Court held that a federal district court had jurisdiction under Section 301(a) of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. 185(a), over a suit brought by a union against an employer to enforce the terms of a strike settlement agreement even though the union in the agreement disclaimed any entitlement to recognition as the exclusive bargaining representative of the employees in the unit.

The Court rejected the contention that "[s]uits for violation of contracts between an employer and a labor organization representing employees," as used in Section 301(a), should be confined to "agreements concerning wages, hours, and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees" (369 U.S. at 25), and noted that such a contention would, among other things, support the "improbable congressional intent that the federal courts [would] be closed to [Section 8(f)] contracts" (*id.* at 27).

As the Court made clear, the decision in *Lion Dry Goods* concerned primarily the *jurisdiction* of federal courts under Section 301(a) to consider contracts between employers and labor organizations, and not the validity or enforceability of particular contracts or contract terms.[1] While the Court indicated its view that the strike settlement agreement in that case would be enforceable (369 U.S. at 27), it did not consider or purport to decide whether all labor contracts—either Section 8(f) agreements or otherwise—would be enforceable, or under what circumstances they would be enforceable.

The proposition suggested by *Lion Dry Goods* that federal courts under Section 301(a) have jurisdiction over Section 8(f) agreements, and may even enforce such agreements in certain circumstances, is entirely consistent with the Board's position in this and related cases. As we pointed out in our opening brief (pp. 26-27), an employer is bound by a Section 8(f) agreement if the union in fact represents a majority of the employees in the appropriate unit, and in those circumstances the union

[1]Thus the Court stated (369 U.S. at 25, n. 6), "[the employer] agree[s] that the only issue is jurisdictional."

could bring suit under Section 301(a) for the enforcement of the agreement. Similarly, if the employer does not dispute the union's majority or agrees to be bound by the agreement, federal courts under Section 301(a) could determine disputes over the meaning of contract terms.

But *Lion Dry Goods* does not suggest that Section 301(a) renders enforceable contracts the enforcement of which would otherwise contravene the policies of the National Labor Relations Act, which is the very issue presented in this case. For example, *Lion Dry Goods* did not overrule *International Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731, where the Court reaffirmed the established principle that a collective bargaining agreement between a minority union and an employer was an unfair labor practice, which tended "to completely frustrate employee realization of the premise of the Act" (*id.* at 738-739), and was not "valid and enforceable [even] as to those employees who consented to it * * *" (*id.* at 737).[2] Indeed, the Court in *Lion Dry Goods* expressly stated that its decision "does not touch upon whether minority unions may demand

[2]The Court in *Lion Dry Goods* stated, by way of illustrating contracts cognizable under Section 301(a), that "'Members only' contracts have long been recognized." 369 U.S. at 29. The fact that the Court emphasized that "members only" contracts—contracts that apply only to union members when no exclusive bargaining agent has been selected—have been recognized as consistent with the policies of the Act reflects, we submit, its view that federal courts may, under Section 301(a), enforce labor contracts so long as they are otherwise consistent with the policies of the Act. Indeed, this Court and the courts of appeals have subsequently made that clear by not enforcing contracts where enforcement would conflict with Board decisions under the Act. See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272; *Smith Steel Workers* v. *A.O. Smith Corp.*, 420 F. 2d 1, 7 (C.A. 7); *Retail Clerks International Association* v. *Montgomery Ward & Co.*, 316 F. 2d 754 (C.A. 7).

that employers enter into particular kinds of contracts or the circumstances under which employers may accord recognition to unions as exclusive bargaining agents." 369 U.S. at 28-29. The issue in the present case is whether the terms and policies of the Act permit or prohibit the enforcement of a Section 8(f) agreement against an employer and his employees when the union does not represent a majority, and that issue was not considered or decided by *Lion Dry Goods*.[3]

2. Respondent and *amicus curiae* strain to find inconsistencies between the Board's decision in this case and the reasoning they infer from—but not the holdings of—other Board decisions. For example, *amicus* argues that there is an inconsistency with *Local 86, Painters (Carpet Control, Inc.)*, 216 NLRB 1127 (Am. Br. 52-54), because the Board in that case, in holding that a union violated Section 8(b)(7) by picketing to secure a new Section 8(f) agreement, did not expressly disagree with its dissenting member's view that if the picketing was merely to enforce an existing Section 8(f) agreement, the picketing would not have been unlawful. *Amicus* therefore argues that the Board's alleged failure to explain the supposed "logical dilemma" warrants a remand to the Board (Am. Br. 49, 52). As discussed in our opening brief, the Board's decisions in this area reflect a consistent rationale and the supposed logical dilemmas are illusory.

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[3]We assume that the AFL-CIO would not contend that Section 301 and *Lion Dry Goods* require a federal court to enforce a Section 8(f) agreement after a union has been ousted by a Board-held election, since it appears to agree that such an event terminates the enforceability of such agreements (Am. Br. 38, n. 43). That being so, it is difficult to see the relevance of *Lion Dry Goods* to the issue here, which the AFL-CIO also appears to agree (despite stylistic criticisms) is *when* the agreement becomes unenforceable (*id.* at 37-40, and nn. 43, 44).

As stated in our opening brief, *Disney Roofing*[4] and *Sullivan Electric*[5] (discussed at Res. Br. 10; Am. Br. 46-52) reflect the Board's rule that a union does not violate Section 8(b)(7) when it pickets to enforce an existing agreement after the employer has recognized the union as the majority representative of his employees; neither case stands for the proposition that the employer's execution of a Section 8(f) agreement, without more, constitutes "initial recognition" of the union as the majority representative of his employees. In *Disney Roofing* there was no question concerning the union's majority status. Disney's employees were all members of the union when it originally entered into a collective bargaining agreement with Disney, and the union was still the majority representative when it picketed to obtain a renewal of that contract.[6] Similarly, in *Sullivan Electric*, the Board found as a fact that the employer "had recognized and extended bargaining rights to the [union] long before the disputed picketing commenced * * *." 146 NLRB at 1087; *id.* at 1093. In *Local 86, Painters*, as noted, the Board held that the union *did* violate Section 8(b)(7) when it picketed to obtain a Section 8(f) contract

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[4]*Bay Counties District Council of Carpenters (Disney Roofing and Material Company)*, 154 NLRB 1598.

[5]*Building and Construction Trades Council of Santa Barbara County (Sullivan Electric Company)*, 146 NLRB 1086.

[6]The Board stated: "In our view the pre-1962 relationship between [the union] and Disney establishes that Disney recognized [the union] as the representative of its employees. At the time the picketing began, virtually every one of Disney's employees was either a member of a union affiliated with [the] District Council or had recently terminated such membership as a result of Disney's violations of Section 8(a)(2), so there is no question of the majority status of [the union]. And no legitimate reason is suggested to support Disney's decision to cease recognizing [the union] as the representative of its employees in 1962." 154 NLRB at 1605-1606.

with the employer, and the Board's failure to comment on a hypothetical situation which it did not find to have existed reflects, if anything, prudent administrative (and judicial) practice, rather than a "logical dilemma" requiring further explication.

Oilfield Maintenance Co., Inc., 142 NLRB 1384, also relied on by respondent and *amicus* (Res. Br. 15-16; Am. Br. 42-44), involved an unusual factual situation not presented here, and has been expressly limited by the Board to its particular circumstances. In that case a predecessor employer had Section 9(a) collective bargaining agreements with five unions. The successor employer refused to honor the agreements and entered into a new agreement with another union which it sought to justify as a Section 8(f) agreement. The Board held that the successor employer could not use Section 8(f) to abrogate existing valid contracts. But since the Board found that the successor employer had sucessfully rebutted the presumption of continued majority status of the unions after their contracts had expired, it declined to order the successor employer to bargain with four of those unions for new contracts. However, the Board found that the predecessor employer had entered into a Section 8(f) agreement with the fifth union that was still in force and ordered the successor employer to honor that agreement until it expired or the union was unseated by an election.

The focus of the *Oilfield Maintenance* decision was on a successor employers' attempt to use Section 8(f) to repudiate existing agreements entered into by its predecessor and the Board has declined to extend the decision to the kind of Section 8(f) agreements involved in this case and *R.J. Smith Construction Co.*, 191 NLRB 693, enforcement denied *sub nom. Local 150, Operating Engineers* v. *National Labor Relations Board*, 480 F. 2d

1186 (C.A. D.C.). Thus in *Ruttmann Construction Co.*, 191 NLRB 701, n. 5, decided the same day as *R.J. Smith*, the Board held that an employer had not refused to bargain in violation of Section 8(a)(5) when it declined to apply a Section 8(f) agreement with one union to a new project and instead entered into another Section 8(f) agreement with another union;[1] it distinguished *Oilfield Maintenance* on the ground that "*Oilfield* primarily concerned the right of a successor-employer to disavow contracts made by a predecessor with five different unions and substitute the terms of a contract it had with another union." That situation is not presented here.

3. Respondent and *amicus* argue generally that respondent's picketing at the Grace and Barmet jobsites was not in violation of Section 8(b)(7) because (1) the Board's decisions under that Section only proscribe picketing for "initial recognition," (2) Higdon Construction had initially recognized respondent by signing a Section 8(f) agreement for the Glenmore project, and (3) the Board found that Higdon Contracting was the *alter ego* of Higdon Construction. That chain of reasoning is erroneous.

In concluding that the Union, in picketing to enforce the agreement at the Grace and Barmet projects, was seeking initial recognition, the Board explained (Pet. App. 20a; footnote omitted) that "the duty of Higdon Construction and its *alter ego*, Higdon Contracting, to honor the Employer's collective-bargaining agreement with [the Union] is limited by the nature of 8(f) agreements." For the reasons set forth in our opening brief (pp. 19-35), the Board properly concluded that a "'prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship';" "8(f) contracts do not carry,

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[1] Quoting from *Ruttmann Construction Co.*, *supra*, 191 NLRB at 702.

even with union-security provisions, a presumption of majority status until such time as employees for particular projects have been hired" (Pet. App. 19a).[7]

Accordingly, even Higdon Construction would have been free to repudiate the contract at the Glenmore project before the Union had acquired majority status there, and picketing at that jobsite by respondent before it obtained majority support would have been subject to Section 8(b)(7). But even if respondent had acquired majority status at the Glenmore jobsite,[8] this would not have required Higdon Construction to apply that contract to the Grace an I Barmet projects absent an independent showing of respondent's majority at those projects. Higdon Contracting is in no different position.[10] Hence,

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[7]See also *Dee Cee Floor Covering, Inc.*, 232 NLRB No. 72, decided September 27, 1977, slip op. 4 ("the mere fact that the Union might indeed have represented a majority of the employees at Respondent Dee Cee's previous jobsites is of no consequence inasmuch as the Union must demonstrate its majority at each new jobsite in order to invoke the provisions of Section 8(a)(5) of the Act").

[8]The Board, however, found that, even at that project, respondent never represented a majority of Higdon's employees (Pet. App. 15a).

[10]Contrary to respondent's attempt to depict Higdon's action as a subterfuge designed to avoid contract obligations, it is not a violation of the National Labor Relations Act for a company having a union agreement, in order to compete in the non-union construction market, to form a subsidiary to employ non-union labor to work non-union jobs. See Penfield, *The Double-Breasted Operation in the Construction Industry*, 27 CCH Labor Law J. 89 (1976); *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, decision following remand, *sub nom. Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB No. 13, 95 LRRM 1510.

As Gerald Higdon, president of both companies, explained (App. 31):

> * * * I have a lot of competition that is * * * non-Union and I have to compete with em * * *; otherwise I'd be competing with Union people and * * * I am just not big enough to compete with most of the Union people in this area.
>
> When it comes to larger jobs, I am not there. I have to compete with the smaller contractors. So, I formed the second company * * *.

Higdon pointed out that, while he did not pay union scale and benefits on non-union projects, he attempted to assure his employees full-time employment: "Yes, I pay 'em less than Union scale, but I imagine they make more in a year's time than a Union member" (Tr. 69). He also explained that, in order to provide full-time employment for his men, he used them not only to do "ironwork" but to do various other types of construction work, as "that's the only way I can keep 'em busy the year round" (Tr. 70).

respondent's effort to force it to apply the contract to the new projects may properly be viewed as an effort to obtain initial recognition there, within the meaning of Section 8(b)(7)(C) of the Act.

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should

be reversed, and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,
National Labor Relations Board.

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